



ENVIRONMENTAL LAW & POLICY CENTER

June 10, 2021

Ohio Department of Agriculture
Division of Livestock Environmental Permitting
8995 East Main Street
Reynoldsburg, Ohio 43068
lepp@agri.ohio.gov

Re: Draft Permit to Install/Permit to Operate for Continental Dairy, LLC

Dear Division of Livestock Environmental Permitting:

The Environmental Law & Policy Center (ELPC) submits these comments in opposition to the proposed final Permit to Install and Permit to Operate for Continental Dairy, LLC. ELPC is the Midwest's leading public interest environmental advocacy organization and has long worked to protect water quality around the region, particularly in the Great Lakes. ELPC is commenting on this permit because its issuance would further fuel the toxic algae outbreaks that plague western Lake Erie and prevent the State of Ohio from meeting its commitment to reduce phosphorus loads by 40% from 2008 levels made pursuant to Annex 4 of the Great Lakes Water Quality Agreement.

The permit should be denied under applicable legal standards for three independent reasons: (a) the proposed Continental Dairy expansion requires a permit under the Clean Water Act's National Pollution Discharge Elimination System (NPDES) from the Ohio Environmental Protection Agency, which the applicants have not sought; (b) ODA failed to conduct the required anti-degradation review; and (c) the facility will not be operated to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality as required by Ohio Administrative Code § 901:10-1-03(A)(5).

1. The Permit Must Be Denied Because Continental Dairy Requires an NPDES Permit from Ohio EPA.

"No person may discharge any pollutant or cause, permit or allow a discharge of any pollutant without applying for and obtaining an Ohio NPDES permit in accordance with the requirements of this chapter." Ohio Admin. Code (OAC) 3745-33-02(A). "Discharge of a pollutant or pollutants" means "any addition of any pollutant to waters of the state from a point source." OAC 3745-33-01(D)(2). "Point source" is defined to include, *inter alia*, a "concentrated animal feeding operation." OAC 3745-33-01 (P)(2). Consequently, Ohio EPA requires NPDES permits for animal agriculture operations that (a) meet the federal definition of "large CAFO" or "medium CAFO" and (b) discharge or propose to discharge into the waters of the state. See <https://www.epa.state.oh.us/portals/35/cafo/NPDESPartI.pdf>

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Continental Dairy meets both of those requirements, so it must get an NPDES permit. First, it falls within the federal definition of a “large CAFO” because it “stables or confines as many or more than . . . 700 mature dairy cows.” 40 C.F.R. §122.23(b)(4)(i). Second, the permit application demonstrates that Continental Dairy proposes to discharge into the waters of the state. As explained below, that is because Continental Dairy proposes to land-apply manure to fields where the runoff would enter the “waters of the state” and not fall within the “agricultural stormwater” exemption to the definition of “discharge.”

“A CAFO proposes to discharge if it is designed, constructed, operated or maintained such that a discharge will occur. . . . [T]here is no exemption for large storm events, and . . . land application field discharges may trigger NPDES requirements.” <https://www.epa.state.oh.us/dsw/cafo/index>. Specifically, “[t]he discharge of manure to waters of the state from a facility as a result of application of that manure by the facility to land application areas is a discharge from that facility subject to NPDES requirements except where it is an agricultural stormwater discharge.” Ohio Admin. Code 901:10-2-14. “Agricultural stormwater discharge” is defined as:

runoff generated by precipitation that drains over terrain used for agriculture as defined in section 1.61 of the Revised Code that conveys manure to waters of the state, provided that the manure has been applied in accordance with site specific nutrient management practices that *ensure appropriate agricultural utilization of nutrients* in manure in compliance with the best management practices set forth in Chapter 901:10-2 of the Administrative Code.

OAC 901:10-1-01(emphasis added).

The science is clear that once soil test phosphorus (STP) concentrations exceed 50 ppm Bray, crops cannot utilize that nutrient for growth. Winslow. 2019. “Commentary: Achieving Phosphorus Reduction Targets for Lake Erie.” *Journal of Great Lakes Research* 45 (1): 4–11, 3. <https://doi.org/10.1016/j.jglr.2018.11.004>. Phosphorus applied above that level thus cannot be subject to “agricultural utilization.” Consequently, to the extent Continental Dairy proposes to land-apply manure to fields where STP exceeds 50 ppm and where runoff from those fields could be expected to enter the waters of the state, Continental Dairy is “proposing to discharge” and must get an NPDES permit.

The permit application shows that Continental Dairy is proposing to do just that by land- applying manure to multiple fields with STP tests over 50 ppm, including:

- Field 45, which abuts the Auglaize and Blanchard Rivers, and for which one quarter of all field samples showed STP above 50 ppm (Draft Permit, 260, Field Soil Testing, and Draft Permit, 208, Field Maps);
- Field 158, which abuts the Blanchard River (Draft Permit, 293, Field Soil Testing and Draft Permit, 208 Field Maps);
- Field 174, which abuts a ditch that flows into Prairie Creek and then on to the Auglaize River (Draft Permit, 276, Field Soil Testing, and Draft Permit, 219, Field Maps).

The Auglaize and Blanchard Rivers, as well as the ditch that flows into Prairie Creek, are “waters of the state.” *See* Ohio Revised Code § 6111.01(H) (“waters of the state” means “all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters”).

Consequently, Continental Dairy “proposes to discharge” into the “waters of the state” and thus requires an NPDES permit from Ohio EPA. For that reason alone, ODA must disapprove the proposed permit to operate/install. We also note that any NPDES permit application would have to be denied as well. That is because Ohio Admin. Code 901:10-1-03(C) requires denial of any NPDES permit application if “[d]ischarge from the facility will prevent or interfere with attainment or maintenance of applicable water quality standards.”

2. The Permit Must Be Denied Because No Anti-Degradation Review was Completed.

Even if no NPDES were required (which it is), ODA would still have to deny issuance of a final permit to Continental Dairy because doing so will contribute to the degradation of water quality in Ohio.

Under OAC § 3745-1-05(B)(1)(b) the antidegradation rules apply to “any permit to install . . .” and, here, ODA is considering whether to issue a final permit to install and operate. OAC § 3745-1-05(C)(1) requires that “[e]xisting uses shall be maintained and protected. There may be no degradation of water quality that results in either a violation of the applicable water quality criteria for the designated uses.” The Director has a duty to “prohibit increased concentrations of specific regulated pollutants that are incompatible with the attainment or restoration of the designated use.” *Id.*

There is no assessment of water quality degradation included in the draft permit or any associated materials on ODA’s website. At the very least, the permit process should be stayed so that ODA can carry out an appropriate antidegradation assessment.

If that assessment was conducted, it would require a denial of the Continental Dairy permit to install and operate. For the fields listed in the Section 1 - particularly Field 45 on the banks of the Auglaize and Blanchard Rivers - Continental’s land application of manure will interfere with the designated uses of those water bodies. The headwaters of the Auglaize River to the Blanchard River are designated as warm water habitat, agricultural and industrial water supply, and primary contact recreation (swimming, fishing, boating, wading). OAC § 3745-1-11. Continental Dairy’s land application of its manure to fields that exceed 50 ppm STP will interfere with these designated uses by increasing the amount of dissolved reactive phosphorus (DRP) and harmful bacteria in the water. Manure land-application on fields above 50 ppm of phosphorus results in large upticks in DRP runoff from drainage systems. In turn, DRP contributes to algal blooms and the diminishment of suitability of the water for aquatic life,

wading, boating, and swimming. (Winslow et. al. 2019, 3). At field 45, a quarter of the soil tests performed exceeded 50 ppm. Draft Permit, 260, Field Soil Testing. Both of these rivers are already impaired for recreational uses and this permit will contribute to their continued diminishment. Water Quality Assessment Unit Summaries (2020), Lapp Ditch-Auglaize River, Deer Creek Blanchard River, <https://geo.epa.ohio.gov/portal/apps/webappviewer/index.html?id=79c3595f371e4324b82b0e5a9f96fc15>.

Beyond the consequences in any particular field, Continental Dairy overall plans to add a total of nearly 100 tons of new phosphorus to an already distressed Maumee River Watershed. Draft Permit, 156. There is no doubt that this phosphorus will run off fields, through tiles, during winter spreading, and during high rain events. The cumulative total phosphorus added to the watershed by this permit and others pending before ODA will degrade water quality. This lowering of water quality cannot be justified given that the Lake Erie algal blooms continue to threaten drinking water and recreation for all Ohioans. At minimum, the Department should undertake a public process to investigate the water quality degradation consequences of issuing this permit, as required by OAC § 3745-1-05(C)(3).

3. The Permit Must Be Denied Because the Facility Will Not be Operated to Prevent Discharges of Pollutants to Waters of the State.

The “criteria for decision-making” on permits to install/operate are in Ohio Administrative Code § 901:10-1-03. Among other things, that section states that the Director of ODA “shall deny” a permit if “[t]he facility is not designed or constructed as a non-discharge system or operated to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality.” *Id.* § 901:10-1-03(A)(5). As demonstrated above, Continental Dairy will not be operated “to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality” -- to the contrary, the facility proposes to discharge to waters of the state and that discharge is not subject to the agricultural runoff exception. For that reason alone, the final permit should be denied.

4. Conclusion

ELPC appreciates the opportunity to comment on the proposed Continental Dairy permit to install and permit to operate. For the reasons explained above, we urge ODA to deny issuance of a final permit.

Sincerely,

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